Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor

FEDERAL COURT (PULAU PINANG) — CIVIL APPEAL NO 02-153-94
EDGAR JOSEPH JR, MOHAMED DZAIDDIN FCJJ AND ABU MANSOR ALI JCA
9 FEBRUARY 1996

Civil Procedure *— Judgments and orders — Application for setting aside — Order for sale — Chargor not served with notice of adjourned hearing — Order was drawn up and perfected 10 months before application to set aside was made — Chargor had made partial repayment — Whether chargee had deprived chargor opportunity of being heard — Whether failure to serve notice rendered order a nullity or an irregularity — Whether court functus officio — Whether lapse of time a bar to chargors' application —Rules of the High Court 1980 O 83 r 2(4)*

Civil Procedure *— Functus officio — Application to set aside order for sale of land — Failure to serve notice of adjourned hearing to chargor — Whether court could set aside after order was made and perfected — Whether court was functus officio*

Civil Procedure *— Judgments and orders — Ex parte orders — Validity — Order for sale of land — Whether failure to serve notice of adjourned hearing rendered order an irregularity or a nullity*

Civil Procedure *— Time — Delay in applying to set aside judgment — Whether lapse of time a bar to application where judgment was a nullity — Whether court had inherent powers to set aside a default judgment despite defendant's application being out of time*

Civil Procedure *— Waiver — Absence of intention to waive — Whether order which was a nullity was capable of being waived*

Land Law *— Charge — Order for sale — Failure of chargee to serve notice of adjourned hearing — Whether sending notice was similar to serving notice — Whether failure to serve notice rendered order a nullity — Rules of the High Court 1980 O 83 r 2(4)*

The appellants had charged a piece of land in Kuala Muda, Kedah to the first respondent. The first respondent commenced proceedings on 8 March 1991 by way of originating summons to enforce the charge. The originating summons was served on the appellants. Although the appellants did not enter appearance, on 30 October 1991, that was, the hearing date of the originating summons, the appellants did attend court but the case was postponed to 29 January 1992. On 29 January 1992, the case was heard ex parte and order in terms of the originating summons including an order for sale pursuant to ss 256(3) and 257(1) of the National Land Code 1965 ('the ex parte orders') was made. In their application to set aside the ex parte orders, the appellants claimed that they had not attended court on 29 January 1992 because they had not been served with a notice of the adjourned hearing, pursuant to O 83 r 2(4) of the Rules of the High

A Court 1980 ('the RHC 1980'). They further contended that the ex parte orders were null and void as there had been a breach of the rule of natural justice, expressed in the maxim *audi alteram partem* and reinforced in O 83 r 2(4) the RHC 1980. The first respondent contended that: (i) the High Court was functus officio as the ex parte orders had been perfected before the appellants' summons in chambers B to set aside had been filed; (ii) the effect of the failure to serve the notice was merely to render the ex parte orders an irregularity, which irregularity had been cured by waiver on the part of the appellants by reason of their having made partial repayments of the amount due to the first respondent while the originating summons was still pending; C and (iii) the appellant had not applied to set aside the ex parte orders within reasonable time as the orders had been made 10 months ago. The first respondent's contentions were upheld by the judge. The appellants appealed.

D **Held**, allowing the appeal:

(1) The rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except insofar as is necessary to correct errors in expressing the intention of the court, is subject to exceptions, one of which is that an order which is a E nullity, owing to the failure to comply with an essential provision such as service of process, can be set aside by the court which made the order in the exercise of its inherent jurisdiction (see p 381A–C); *Craig v Kanssen* [1943] 1 All ER 108 and *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd* F [1988] 1 MLJ 546 followed.

(2) Order 83 r 2(4) RHC 1980 is merely a statutory enunciation of the fundamental rule of natural justice expressed in the maxim *audi alteram partem* so that the obligation to serve notice of the adjourned hearing remained even if O 83 r 2(4) the RHC 1980 G did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem* (see pp 381I and 382A–B).

(3) Sending a notice is a far cry from serving one. Even if there was proof of posting of the notice, this accompanied by the fact that H it was not returned would not have sufficed as proof of service in the absence of a deeming clause in the contract of loan or annexure to the charge (see pp 382I and 383A).

(4) The effect of the failure on the part of the first respondent to notify the appellants of the date of the adjourned hearing was of I such fundamental importance as to render each and every one of the ex parte orders obtained a nullity (see p 383D); *White v Weston* [1968] 2 All ER 842 followed.

(5) Lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. Further, under its inherent jurisdiction to prevent an abuse of proceedings, the court has power to set aside a judgment in default despite the defendant's application being out of time if the particular circumstances of the case require it (see pp 384I and 385A–C); *Atwood v Chichester* (1878) 3 QBD 722 and *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 followed.

(6) There can be no waiver in the absence of an intention to waive. Here, the appellants were ignorant laypersons who were unrepresented and obviously knew nothing about their legal rights. In any event, an order which is a nullity is incapable of being waived. The appellants' application to set aside the ex parte orders, therefore, was not barred by waiver (see p 385F); *Darnley (Earl of) v Proprietors of London, Chatham and Dover Rly* (1867) LR 2 HL 43 followed.

[Bahasa Malaysia summary

Perayu-perayu telah mencagar sebidang tanah di Kuala Muda, Kedah kepada penentang pertama. Penentang pertama telah memulakan prosiding pada 8 Mac 1991 melalui saman pemula untuk menguatkuasakan cagaran tersebut. Saman pemula itu telah disampaikan ke atas perayu-perayu. Walau bagaimanapun perayu-perayu tidak memasukkan kehadiran mereka. Pada 30 Oktober 1991, iaitu tarikh pembicaraan saman pemula, perayu-perayu telah hadir di mahkamah, tetapi kes itu telah ditunda ke 29 Januari 1992. Pada 29 Januari 1992, kes itu telah dibicarakan secara ex parte dan perintah seperti dikehendaki dalam saman pemula, termasuk suatu perintah jualan menurut ss 256(3) dan 257(1) Kanun Tanah Negara 1965 ('perintah ex parte') telah dibuat. Dalam permohonan mereka untuk mengenepikan perintah ex parte itu, perayu-perayu telah menuntut bahawa mereka telah tidak hadir di mahkamah pada 29 Januari 1992 kerana mereka tidak disampaikan dengan notis mengenai penangguhan pembicaraan menurut A 83 k 2(4) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT 1980'). Perayu-perayu juga telah berhujah bahawa perintah ex parte itu adalah batal dan tak sah kerana terdapat perlanggaran rukun keadilan asasi yang dinyatakan dalam maxim *audi alteram partem,* yang telah diperkukuhkan oleh A 83 k 2(4) KMT 1980. Penentang pertama pula mendakwa bahawa: (i) Mahkamah Tinggi tersebut adalah functus officio kerana perintah ex parte tersebut telah disempurnakan sebelum saman dalam kamar perayu untuk mengenepikan perintah difailkan; (ii) kegagalan menyampaikan notis hanya menyebabkan perintah ex parte itu luar aturan semata-mata, dan ia telah dibetulkan oleh penepian perayu-perayu kerana mereka telah membuat sebahagian daripada pembayaran balik amaun yang terhutang kepada penentang pertama

A sementara menunggu perbicaraan saman dalam kamar; dan (iii) perayu tidak memohon untuk mengenepikan perintah ex parte tersebut dalam masa yang munasabah kerana perintah tersebut telah dibuat 10 bulan yang lalu. Hujahan penentang pertama telah dibenarkan oleh hakim. Perayu-perayu telah merayu.

B

Diputuskan, membenarkan rayuan itu:

(1) Rukun bahawa mahkamah tidak mempunyai kuasa di bawah sebarang permohonan dalam sesuatu tindakan untuk meminda atau mengubah suatu penghakiman setelah ianya dimasukkan
C atau suatu perintah setelah ianya dibuat, kecuali sejauh mana yang perlu, untuk membetulkan kesilapan penyataan niat mahkamah, adalah tertakluk kepada pengecualian, satu daripadanya ialah jika suatu perintah merupakan suatu pembatalan disebabkan kegagalan dalam mematuhi peruntukan
D asas seperti penyampaian proses, ia boleh diketepikan oleh mahkamah yang membuat perintah itu dalam melaksanakan bidang kuasa sedia adanya (lihat ms 381A–C); *Craig v Kanssen* [1943] 1 All ER 108 dan *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546 diikut.

(2) Aturan 83 k 2(4) KMT 1980 adalah hanya penyebutan statutori
E rukun dasar keadilan asasi yang dinyatakan dalam maxim *audi alteram partem,* dan maka, kewajipan untuk menyampaikan notis mengenai penangguhan pembicaraan berkekalan walaupun A 83 k 2(4) KMT 1980 tidak terpakai. Adalah merupakan suatu peraturan tafsiran biasa bahawa melainkan terdapat niat yang
F sebaliknya, suatu enakmen telah secara implikasi meminjam prinsip maxim *audi alteram partem* (lihat ms 381I dan 382A–B).

(3) Menghantar suatu notis jauh berbeza daripada menyampaikannya. Walaupun terdapat bukti pengeposan notis itu, ini disertakan dengan fakta bahawa ianya tidak dikembalikan tidak memadai sebagai bukti
G penyampaian dengan tiadanya fasal anggapan dalam kontrak pinjaman atau lampiran kepada cagaran itu (lihat ms 382I dan 383A).

(4) Kesan kegagalan penentang pertama untuk memberitahu perayu-perayu mengenai tarikh pembicaraan yang ditangguhkan begitu
H penting sehingga menyebabkan setiap satu perintah ex parte yang didapatkan tersebut suatu pembatalan (lihat ms 383D); *White v Weston* [1968] 2 All ER 842 diikut.

(5) Peluputan masa tidak merupakan halangan kepada permohonan seseorang defendan untuk mengenepikan penghakiman yang
I merupakan suatu pembatalan. Selanjutnya, di bawah bidang kuasa sedia adanya untuk mencegah penyalahgunaan prosiding, mahkamah mempunyai kuasa untuk mengenepikan suatu penghakiman ingkar walaupun permohonan defendan adalah di

luar had masa jikalau keadaan-keadaan tertentu sesuatu kes memerlukannya (lihat ms 384I dan 385A–C); *Atwood v Chichester* (1878) 3 QBD 722 dan *Tuan Hj Ahmed Abdul Rahman v Arab Malaysian-Finance Bhd* [1996] 1 MLJ 30 diikut.

(6) Penepian tidak boleh berlaku jikalau tidak terdapat niat untuk mengetepi. Di sini, perayu-perayu adalah orang yang bukan profesional dalam perkara ini, yang tidak diwakili dan jelas tidak tahu akan hak-hak mereka. Walau bagaimanapun, perintah yang merupakan suatu pembatalan tidak boleh diketepikan. Permohonan perayu-perayu untuk mengenepikan perintah ex parte, oleh itu, tidak dihalang oleh pengetepian (lihat ms 385F); *Darnley (Earl of) v Proprietors of London, Chatham and Dover Rly* (1867) LR 2 HL 43 diikut.]

Notes

For cases on appeals, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on functus officio, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1409–1412.

For cases on judgments and orders, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2032–2065.

For cases on time, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3545–3585.

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed) paras 1111–1118; [1991] Mallal's Digest 1364–1381; [1992] Mallal's Digest 1247–1258.

Cases referred to

Atwood v Chichester (1878) 3 QBD 722

Cooper v Wandsworth Board of Works (1863) 14 CB NS 180

Craig v Kanssen [1943] 1 All ER 108

Darnley (Earl of) v Proprietors of London, Chatham and Dover Rly (1867) LR 2 HL 43

Marsh v Marsh [1945] AC 271

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Meng, Intervener) [1992] 2 MLJ 642

Pritchard (decd), Re [1963] 1 All ER 873

R v University of Cambridge (1723) 1 Stra 557

Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30

United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd [1988] 1 MLJ 546

White v Weston [1968] 2 All ER 842

Wiseman v Wiseman [1953] 1 All ER 601

Legislations referred to

National Land Code 1965, ss 256(2), (3), 257(1), 340(2)(b)
Rules of the High Court 1980 O 83 r 2(1), (4)
Metropolis Management Act 1855 s 76 [UK]

Appeal from: Originating Summons No 24–165–91 (High Court, Penang)

Thayalan Muniandy (Meena, Thayalan & Partners) for the appellants.
Paul Chin (Gan Teik Chee & Ho) for the respondents.

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court): This appeal arose out of an unsuccessful chargors' application by way of summons in chambers to set aside an order for sale made pursuant to s 256(3) of the National Land Code 1965 ('the Code') of certain charged land comprised in temporary certificate of title No HS(D) 6287/86 PT No 2695 (plot no 1723) mukim Sungei Pasir, daerah Kuala Muda, Kedah ('the land') and consequential orders which included an order for vacant possession, on the ground that they had not received prior notice of the date of adjourned hearing of the chargee's application to enforce the charge concerned ('the charge'), contrary to O 83 r 2(4) of the Rules of the High Court 1980 ('the RHC 1980').

The history of the matter which called for the consideration of the court may be shortly stated.

As already noted, the chargees who are the first respondents to this appeal had, on 8 March 1991, pursuant to s 256(2) of the Code, commenced proceedings by way of originating summons in the High Court, holden at Penang, to enforce the charge created in their favour by the chargors, who are the appellants herein. The second respondent to this appeal was the purchaser at the judicial sale ('the purchaser') of the land and had been added as a party to the appeal at our behest since it was obvious that if the chargors were to succeed, his right would be affected thereby. In the event, by way of a letter addressed to this court, the purchaser through his solicitors had taken a neutral position and was content to leave the matter to the court but urged that in the event of the appeal succeeding he be not condemned in costs.

The chargors, although duly served with the originating summons, did not enter appearance but on the date fixed for hearing — that is to say, 30 October 1991 — they did attend court but the case was not heard on that day. The originating summons was then refixed for hearing on 29 January 1992, and on that day, the case was heard ex parte and orders in terms of the originating summons, including the order for sale, had been made in favour of the chargees, pursuant to ss 256(3) and 257(1) of the Code ('the ex parte orders').

In their affidavit filed in support of their summons in chambers, the chargors, who are husband and wife, had claimed that they had not attended court on the day when the case was heard and the ex parte orders made, because they had not been served with notice of the adjourned date of hearing.

What, then, was the effect of the failure to serve the chargors or either of them with notice of the adjourned hearing of the originating summons on the ex parte orders?

Before the judge, counsel for the chargors contended that the ex parte orders had been thereby rendered null and void as there had been a breach of the rule of natural justice expressed in the maxim *audi alteram partem* reinforced by O 83 r 2(4) the RHC 1980 which provides:

> Where the hearing is adjourned, then, subject to any directions given by the court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing.
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> A copy of any affidavit served under this paragraph must be indorsed in accordance with para (3).

On the other hand, in the court below, counsel for the chargees has taken the point, that as the ex parte orders had been perfected before the chargors' summons in chambers to set aside had been filed, the High Court was functus officio, having regard to the principles enunciated in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642. Before us, though counsel for the chargees did not take the point, he did not abandon it either.

In the alternative, counsel for the chargees had contended that the effect of the failure to serve notice of the adjourned hearing on the chargors or either of them, was merely to render the ex parte orders an irregularity, which he added, in the circumstances of this case, had been cured, by waiver on the part of the chargors by reason of their having made partial repayment of the amount due to the chargees while the originating summons was still pending.

These submissions by counsel for the chargees were all upheld by the judge, and from his judgment the chargors appealed.

At the conclusion of the arguments before us, we allowed the appeal and set aside the judgment of the court below and entered judgment in favour of the chargors.

My reasons for doing so now follow.

Before us, the contentions of counsel on both sides were, in the main, a repetition of their submissions advanced in the court below.

The Functus Officio Point

It would be convenient if I first took the functus officio point.

The rule that the court has no power under any application in the action to alter or vary a judgment after it has been entered or an order after it has been drawn up, except in so far as is necessary, to correct errors in expressing the intention of the court, is subject to certain exceptions, one of which is that an order which is a nullity owing to failure to comply with an essential provision such as service of process, can be set aside by the court which made the order in the exercise of its inherent jurisdiction. (See *Craig v Kanssen* [1943] 1 All ER 108 CA, at p 113 applied in *United Malayan Banking Corp Bhd v Sykt Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546). If, therefore, counsel for the chargors were correct in his contention that the ex parte orders were null and void — a point to which we shall be coming shortly — then the judge was wrong in applying the principle of functus officio to the circumstances of the case before him

The Natural Justice Point: audi alteram partem

The second point I should like to take is the natural justice point.

Counsel for the chargors had contended that neither of his clients had been served with notice of the adjourned hearing of the originating summons, when the ex parte orders had been made, and as a result, were absent, and that they were thereby deprived of the opportunity of being heard, contrary to the requirements of O 83 r 2(4) the RHC 1980.

Counsel for the chargees' answer to this point was that O 83 r 2(4) did not apply to the present case because the relief prayed for by the chargees in their originating summons did not include relief for delivery of possession or payment of moneys secured by the charge.

It was pointed out by counsel for the chargees that it was a pre-requisite requirement of O 83 r 2(4), imposed by O 83 r 2(1), that the plaintiff must have begun a charge action by originating summons, claiming possession or payment of moneys secured by a charge or both, and that the present case was not such a case. It was accordingly submitted that failure to serve the chargors, or either of them, with notice of the adjourned hearing of the originating summons did not vitiate the ex parte orders.

In my view, even if counsel for the chargees were correct in his description of the nature of the reliefs prayed for by the chargees in their originating summons — though, in point of fact, he was not — this would not have relieved the chargees of their duty to serve notice of the adjourned hearing of the originating summons on the chargors because I consider that O 83 r 2(4) has a common law content. In other words, in my view, O 83 r 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim *audi alteram partem* (hear

the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O 83 r 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim *audi alteram partem*. It was said by Fortescue J in *R v University of Cambridge* (1723) 1 Stra 557, where Dr Bentley had been deprived of his academic degrees by decree, that the principles goes back to the garden of Eden. This is how his Lordship put it:

> The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called on to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also.

In *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, s 76 of the Metropolis Management Act 1855 required notice to be given to the district board of an intention to build a new house, failing which they could demolish the house. The board exercised this power in relation to the plaintiff's house without giving him an opportunity to be heard. It was held that an action for trespass lay against the board. Erle CJ said (at pp 187–189):

> The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shows that the plaintiff and the district board had not been quite on amicable terms ... the proceedings to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer ... I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purpose of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss.

The third point I should like to take is the contention by counsel for the chargees that, in any event, inspection of the court file showed that there was in it a copy of a letter addressed to the chargors, stating that the originating summons had been adjourned for hearing on 29 January 1992, which suggested that due notice of the adjourned date of hearing had been sent to the chargors; and on this basis, it was said that there was sufficient compliance with the requirements of O 83 r 2(4).

It is obvious that 'sending' a notice is a far cry from 'serving' a notice and I had, during the arguments, pointed this out to counsel for the chargees, and he readily agreed with this proposition. Indeed, there was no

proof of posting of this notice, and even if there had been, this even if accompanied by the fact that it was not returned, would not have sufficed as proof of service, in the absence of a deeming clause in the contract of loan or the annexure to the charge, bearing in mind especially the denial on oath by the chargors of receipt of the notice of the adjourned date of hearing.

In my view, counsel for the chargors was correct in his contention regarding the natural justice point.

Effect of Non-Service of Notice of Adjourned Hearing

The fourth point I should like to take concerns the contention by counsel for the chargees that the effect of a breach of the rule of natural justice by reason of failure to serve the chargors or either of them with notice of the adjourned hearing was merely to render the ex parte orders an irregularity which, having regard to the circumstances of this case, should be condoned.

In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental importance as to render each and every one of the ex parte orders obtained, in consequence, a nullity. I am supported in this by certain authorities to which I shall now refer.

In *White v Weston* [1968] 2 All ER 842 CA, Russell LJ said this at p 846:

> There has in the past been much discussion whether a judgment is a nullity or a mere irregularity, and for the cases on the subject I may perhaps refer to *Re Pritchard (decd)* [1963] 1 All ER 873; [1963] Ch 502, where they were discussed. UpJohn LJ in that case expressly stated at pp 882–883; at pp 523–524 to be a nullity proceedings which ought to have been served, but have never come to the notice of the defendant at all, excluding, of course, cases of substituted service, service by filing in default, or cases where service has properly been dispensed with. Danckwerts LJ adopted that judgment. I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, ex debito justitiae, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment: '... in accordance with settled practice, the court can exercise its discretion only in one way, namely, by granting the order sought', to quote UpJohn LJ in *Re Pritchard (decd)* [1963] 1 All ER 873 at p 881, letter D; [1963] Ch 502 at p 521.
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> In cases where a defendant has applied to set aside a judgment and is entitled to such an order as of right, the court has exercised its discretion in respect of the defendant's costs of the application if the defendant declines to agree to terms suggested by the court, recognizing that the court cannot impose terms on a defendant who does not agree. But here the court, by making an order that the plaintiff's costs of the November 1966 hearing should be costs in the cause, has in effect imposed a term on the defendant,

> and has qualified or subtracted from his absolute right to have the judgment set aside. In my view the country court judge misdirected himself in considering that he had any power to visit, even contingently, on the defendant the plaintiff's costs of a hearing that, as against this defendant, should never have taken place at all, and to which he was a stranger.

The case of *Marsh v Marsh* [1945] AC 271 PC shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct from voidable, though it was there suggested by Lord Goddard when speaking for the Board that one test which may be applied is whether the irregularity has caused a failure of natural justice. This is how his Lordship put it (at p 284):

> A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v Praetorius* (1888) 20 QBD 764 and *Smurthwaite v Hannay* [1894] AC 494 are leading examples of the former, while *Fry v Moore* (1889) 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

However, in *Wiseman v Wiseman* [1953] 1 All ER 601, Denning LJ (as he then was) criticized the above dictum of Lord Goddard, in my view with considerable justification, when he said:

> It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice; see *Marsh v Marsh* [1945] AC 271, but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.

This contention by counsel for the chargees, therefore, fails.

Delay

The fifth point I should like to deal with concerns the contention by counsel for the chargees that the chargors' application by way of summons in chambers to set aside the ex parte orders, dated 13 November 1992, had not been made within a reasonable time as the ex parte orders had been made some ten months previously, that is to say, on 29 January 1992.

In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See *Atwood v Chichester* (1878)

A 3 QBD 722). I am further supported in this by the following passage in a very recent judgment of the Federal Court in *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 42:

> ... it is clear law that the court still retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that:
>
> B (a) no one has suffered prejudice by reason of the defendant's delay.
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> (b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or
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> (c) to let the judgment stand would constitute oppression. (See *Atwood v Chichester* (1878) 3 QBD 722; *Harley v Samson* (1914) 30 TLRL 450.
>
> C We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court. (See *Beale v MacGregor* (1886) 2 TLR 311).

D This contention by counsel for the chargees, therefore, fails.

The Waiver Point

The sixth and last point I should like to deal with concerns the contention by counsel for the chargees that the chargors' summons in chambers to set E aside the ex parte order was barred by waiver, in that, following the judicial sale by public auction to the purchaser, the chargors had, in response to a letter written to them by the solicitors for the chargees, called at the latter's office and collected the balance of the proceeds of sale after deduction of the money payable under the charge and the usual expenses.

F In my view, there can be no waiver in the absence of an intention to waive. Here, the chargors were ignorant laypersons, who were unrepresented and obviously knew nothing about their legal rights. In the words of Lord Chelmsford LC in *Darnley (Earl of) v Proprietors of London, Chatham and Dover Rly* (1867) LR 2 HL 43 at p 57, 'A waiver must be an intentional act G with knowledge'. In these circumstances, the chargors' acceptance of the money could not be construed as an intention to waive those rights. In any event, in my view, an order which is a nullity is incapable of being waived. Their summons in chambers was, therefore, not barred by waiver.

This contention by counsel for the chargees, therefore, also fails.

H *The Result*

As the judge had failed to take into account or give proper weight to the various matters to which I have drawn attention, his judgment could not, in justice, be allowed to stand, and so we had no alternative but to allow the appeal, with costs here and below, against the chargee only as the I purchaser had not opposed the appeal.

The judgment of the court below including, of course, the order for sale, was accordingly set aside.

In consequence, the sale to the purchaser was set aside and its registration cancelled as having been obtained by an instrument, to wit, the certificate of sale, which was null and void within the meaning of s 340 (2)(b) of the Code. We had also ordered refund of the purchase price to the purchaser and the return of the issue document of title forthwith to the chargee by the purchaser, or whoever may have possession or control of the same. Finally, the proper registering authority was directed to cancel the memorials appearing in the issue document of title and the register document of title relating to the sale to the purchaser, and the deposit paid into court by way of security for costs was to be refunded to the chargors.

My brothers Mohamed Dzaiddin FCJ and Abu Mansor JCA, who were the other members of the court, have perused this judgment and have asked me to say that they are in agreement with it and its reasoning.

Appeal allowed.

Reported by Lim Ai Leen